

No. 95-5661

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

JUAN MELENDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a district court has authority to impose a sentence below the statutory minimum, when the government files a motion under Sentencing Guidelines § 5K1.1 for a downward departure from the applicable Guidelines range, but does not request a sentence below the statutory minimum pursuant to 18 U.S.C. 3553(e).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 22-38) is reported at 55 F.3d 130.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. A petition for rehearing was denied on June 27, 1995. The petition for a writ of certiorari was filed on August 15, 1995, and certiorari was granted on November 6, 1995. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to possess cocaine

with the intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. J.A. 16, 18. The court of appeals affirmed. *Id.* at 22-38.

1. In the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, Congress established mandatory minimum sentences for trafficking in controlled substances, including cocaine. See 21 U.S.C. 841(b) (1988 & Supp. V 1993). A person who distributes or conspires to distribute five kilograms or more of cocaine is subject to a mandatory minimum sentence of ten years' imprisonment. 21 U.S.C. 841(b)(1)(A) (1988 & Supp. V 1993). In the same Act, Congress provided a mechanism for relief from the statutory mandatory minimum sentence when the government files a motion requesting that action for a defendant who cooperates in the investigation or prosecution of others. 18 U.S.C. 3553(e). Section 3553(e) states:

Limited Authority To Impose A Sentence Below A Statutory Minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

In addition, Congress directed the Sentencing Commission to address the issue of substantial assistance in the Sentencing Guidelines:

The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

28 U.S.C. 994(n).¹

Exercising its authority under Section 994(n), the Commission issued Guidelines § 5K1.1, which states:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

Section 5K1.1 also sets forth a series of factors that the district court must consider in determining the extent of the departure. See Guidelines § 5K1.1(a).

¹ At the same time, Congress amended Fed. R. Crim. P. 35(b), to provide authority for a court to reduce a previously imposed sentence to reflect a defendant's substantial assistance:

The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. * * * The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

Application note 1 to Section 5K1.1 explains the relationship between Section 5K1.1 and 18 U.S.C. 3553(e). It states that "[u]nder circumstances set forth in 18 U.S.C. 3553(e) and 28 U.S.C. 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence."

2. In September 1992, confidential informants advised officials of the United States Customs Service in Miami, Florida, that petitioner and Edward Moya were interested in transporting cocaine to the New York area. PSR 4.² Posing as importers and transporters of cocaine, the informants held a series of meetings with petitioner and Moya. *Id.* at 4-5. An agreement was finally reached under which the confidential informants would deliver 225 kilograms of cocaine to petitioner and Moya in three 75 kilogram installments. *Id.* at 5. In return, petitioner and Moya agreed to pay the transportation costs for the deliveries. *Ibid.* The transportation costs for the first 75 kilogram delivery were \$450,000. Petitioner and Moya gave the confidential informants deposits totalling \$12,500 for that delivery. *Id.* at 5-6.

Before delivery could be made, petitioner and Moya were arrested by New York authorities on unrelated drug charges. PSR 6. Moya turned over responsibility for completing the cocaine transaction to his common law wife, Anna Maria Ferrera, and she, her brother, Raphael Ferrera, and her uncle, Bienvenido Polanco, met with the confidential informants for that purpose. *Id.* at 5-6. Raphael Ferrera and Polanco

² PSR refers to the Presentence Report. The district court adopted the findings in that report. J.A. 20.

ultimately agreed to accept delivery of the cocaine, and government agents made a controlled delivery to them of 30 kilograms of cocaine. *Id.* at 7.

Petitioner was charged with conspiring to distribute and conspiring to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846. J.A. 24. Under 21 U.S.C. 841(b)(1)(A) (1988 & Supp. V 1993), that offense carries a mandatory minimum sentence of ten years' imprisonment. Following plea negotiations, petitioner signed a plea agreement. J.A. 4-12. The agreement provided that petitioner would plead guilty to conspiring to possess with intent to distribute more than five kilograms of cocaine and cooperate with the government's investigation of other persons involved in drug trafficking. *Id.* at 4-5. In return, the government agreed that, if petitioner provided substantial assistance in the investigation or prosecution of one or more persons who have committed offenses, the government "will move the sentencing court, pursuant to Section 5K1.1 of the Sentencing Guidelines, to depart from the otherwise applicable guideline range." *Id.* at 9. The parties stipulated that the applicable Guidelines range for petitioner's conduct should be based on his having trafficked in 50 to 150 kilograms of cocaine. *Id.* at 12. The agreement specifically noted that the offense to which petitioner would plead guilty "carries a statutory mandatory minimum penalty of 10 years' imprisonment." *Id.* at 6. The government did not agree to request a sentence below the statutory minimum. See *id.* at 4-12.

Petitioner pleaded guilty to the charged conspiracy. J.A. 24. The presentence report determined petitioner's offense level based on a finding that he had trafficked in 75 kilograms of cocaine, the amount

involved in the first installment. PSR 9. After crediting petitioner with an adjustment for acceptance of responsibility and a timely plea, the presentence report determined that petitioner's offense level was 33. *Ibid.* When combined with petitioner's criminal history category, that led to a Guidelines range of 135-168 months' imprisonment. *Id.* at 12.

Noting that petitioner had met with government officials four times and had answered all questions and that petitioner had provided assistance to the government, the government moved, pursuant to Guidelines § 5K1.1, for a reduction in petitioner's sentence below that "otherwise applicable under the sentencing guidelines." J.A. 13-14. The government did not request a sentence below the statutory minimum. *Ibid.*

The district court granted the government's Section 5K1.1 motion and departed downward from the Guidelines range by sentencing petitioner to the mandatory minimum sentence prescribed by 21 U.S.C. 841(b)(1)(A) (1988 & Supp. V 1993) of 120 months' imprisonment. J.A. 25. The court concluded that it had no authority to depart below the statutory minimum because the government had not requested such a departure pursuant to 18 U.S.C. 3553(e). J.A. 25.

3. The court of appeals affirmed. J.A. 22-38. It held that "a motion under [Sentencing Guidelines] § 5K1.1 unaccompanied by a motion under 18 U.S.C. § 3553(e) does not authorize a sentencing court to impose a sentence lower than a statutory minimum." *Id.* at 32-33. The court noted that the text of 18 U.S.C. 3553(e) authorizes a sentence below the statutory minimum only upon motion of the government. J.A. 27-28. By requiring a government motion, the court reasoned,

Congress "gave the prosecutor the sole key that affords access to a sentence below a statutory minimum." *Id.* at 28.

The court noted that 28 U.S.C. 994(n) gives the Sentencing Commission the responsibility to assure that the Guidelines reflect the principle that substantial assistance can lead to a reduced sentence, including a sentence below the statutory minimum. J.A. 28-29. The court concluded, however, that "nothing in the text of § 994(n) suggests that Congress intended by the passage of § 994(n) to take back the access key given to the prosecutor in § 3553(e)." *Id.* at 29.

The court also rejected petitioner's argument that Guidelines § 5K1.1 permits a departure below the statutory minimum once the government states that the defendant has provided substantial assistance. The court concluded that "the sole authority granted in § 5K1.1 is for departures 'from the guidelines.'" Nor was the court persuaded by petitioner's reliance on application note 1 to Section 5K1.1. The court concluded that the note's reference to 18 U.S.C. 3553 as the source of authority for departures from statutory minimums shows that the Commission made "an advertent decision * * * to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by § 3553(e)." J.A. 30.

Judge Huyett dissented. J.A. 35-38. He concluded that the Commission intended for Section 5K1.1 to serve as a conduit for the application of Section 3553(e), and that the district court therefore had discretion to depart below the statutory minimum once the government filed a motion under Section

5K1.1. *Ibid.* A petition for rehearing was denied, with six judges dissenting.

SUMMARY OF ARGUMENT

The question in this case is whether a district court has authority to impose a sentence below a statutory minimum, when the government files a motion under Guidelines § 5K1.1 for a downward departure from the applicable Guidelines range, but does not request a sentence below the statutory minimum pursuant to 18 U.S.C. 3553(e). The answer to that question is supplied by the text of Section 3553(e).

I. Under 18 U.S.C. 3553(e), a court has authority to impose a sentence below a statutory minimum to reflect a defendant's substantial assistance only "[u]pon motion of the Government" for such a departure. A government motion for a departure from the applicable Guidelines range under Guidelines § 5K1.1 based on a defendant's substantial assistance does not automatically entail a request for a sentence below the statutory minimum. Accordingly, absent a motion that invokes the court's authority under Section 3553(e), a sentencing court has no authority to impose a sentence below the statutory minimum.

That construction of Section 3553(e) is supported by *Wade v. United States*, 504 U.S. 181 (1992). In *Wade*, the Court held that even when the defendant has provided substantial assistance, the government has discretion under Section 3553(e) to refuse to move for a reduced sentence based on its assessment of the costs and benefits that would flow from such a motion. A holding that a motion for a departure from the Guidelines range based on the defendant's substantial assistance also waives the mandatory minimum would

usurp the government's discretion under Section 3553(e) acknowledged by the Court in *Wade*.

The substantial assistance scheme fashioned by Congress and the Commission gives the government greater flexibility to obtain guilty pleas and secure cooperation than would a scheme under which a motion to depart from the applicable Guidelines range automatically waived the statutory minimum. It also reflects the prosecutor's unique perspective on whether a defendant's assistance is sufficiently valuable to warrant a sentence below the statutory minimum, or only a sentence below the applicable Guidelines range.

II. Petitioner's contention that a court has authority to impose a sentence below the statutory minimum once the government acknowledges that the defendant has provided substantial assistance cannot be squared with the text of Section 3553(e). Under Section 3553(e), the court's authority to impose a sentence below the statutory minimum is triggered by a "motion of the Government" for such a sentence, not by the government's statement, acknowledgement, or certification that the defendant has cooperated. 18 U.S.C. 3553(e).

Nor does petitioner derive support from 28 U.S.C. 994(n). That provision directs the Commission to reflect in the Guidelines the general appropriateness of reduced sentences when a defendant has cooperated, including a sentence below the statutory minimum. The text of Section 994(n), however, does not give the Commission the authority to override the requirements in Section 3553(e). Consequently, in fashioning Guidelines to implement Section 994(n), the Commission may not authorize a court to impose

a sentence below a statutory minimum in the absence of a government motion for such a sentence.

The Commission's guideline addressing "substantial assistance" departures, Guidelines § 5K1.1, is consistent with that analysis. The Commission did not purport to dispense with the requirement of a motion under Section 3553(e) when it issued Section 5K1.1. That Section authorizes a court to depart "from the guidelines," and does not refer to sentences below the statutory minimum. Application note 1 to Section 5K1.1, which states that a departure below the statutory minimum may be justified "under circumstances set forth in 18 U.S.C. § 3553(e)," confirms that the Commission did not intend to permit a departure below the statutory minimum unless the government requests such a sentence.

Finally, the requirement of a government motion invoking Section 3553(e) will neither impermissibly constrict the discretion of sentencing courts nor lead to unwarranted sentencing disparities. Sentences below the mandatory minimum require the concurrence of both the prosecutor and the court: the prosecutor has the initial role in determining the sentencing range available to a cooperating defendant, but the sentencing court has the ultimate power to determine the sentence within the applicable range. Moreover, Congress resolved those policy issues when it enacted Section 3553(e), and any change in the requirement of a government motion as a precondition to a departure below the statutory minimum must come from that body.

ARGUMENT

I. UNDER 18 U.S.C. 3553(e), A DISTRICT COURT LACKS AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM IN THE ABSENCE OF A GOVERNMENT MOTION FOR SUCH A DEPARTURE

A. The Text Of Section 3553(e) Requires A Government Motion

The Sentencing Reform Act provides a limited basis for a sentencing court to depart from a statutory mandatory minimum based on a defendant's provision of substantial assistance in the investigation or prosecution of other persons. Under 18 U.S.C. 3553(e), entitled "[l]imited authority to impose a sentence below a statutory minimum," a court's power to impose such a sentence is conditioned "[u]pon motion of the Government." When the government files a motion requesting the court to impose a sentence below the mandatory minimum based on the defendant's substantial assistance, the court has the "authority" to do so, in order "to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." *Ibid.* Such a sentence is to be "imposed in accordance" with the Sentencing Commission's guidelines and policy statements. *Ibid.* In contrast, when the government refrains from filing a motion under Section 3553(e), the court lacks the authority to go below the statutory mandatory minimum based on substantial assistance.³

³ The Sentencing Reform Act provides one other source of authority to depart from a statutory mandatory minimum sentence—the so-called "safety valve" provision enacted in the

Nothing in Section 3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect a defendant's cooperation when the government has not moved for such a sentence, but has instead moved for a departure from the applicable Sentencing Guidelines range alone. When the government files a motion under Section 5K1.1 of the Sentencing Guidelines in recognition of the defendant's substantial assistance, "the court may depart from the guidelines." But a government motion that requests a sentence below the applicable Guidelines range without requesting a sentence below the statutory minimum does not give a court authority, under Section 3553(e), to disregard the statutory minimum sentence set by Congress.

This Court's decision in *Wade v. United States*, 504 U.S. 181 (1992), supports the conclusion that a government request for a sentence below the statutory minimum is necessary before a court can depart

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(a), 108 Stat. 1985, codified at 18 U.S.C. 3553(f). Significantly, that provision empowers the court to act "after the Government has been afforded the opportunity to make a recommendation," *ibid.*, but it does not contain the requirement of a government motion set forth in Section 3553(e). Rather, it authorizes a court to depart in sentencing a narcotics offender when (1) the defendant has only one criminal history point; (2) the defendant did not use violence, credibly threaten violence, or possess a firearm in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant was not an organizer, leader, or supervisor, or engaged in a continuing criminal enterprise, and (5) before sentencing, the defendant truthfully provides all information and evidence the defendant has about offenses that are part of the same course of conduct or common scheme or plan. 18 U.S.C. 3553(f).

from a statutory minimum. In *Wade*, the Court interpreted Section 3553(e) as conferring on the government "a power, not a duty, to file a motion when a defendant has substantially assisted." 504 U.S. at 185. Even when a defendant provides substantial assistance, the Court explained, the government may still exercise its discretion not to move for a sentence below the statutory minimum based "on its rational assessment of the cost and benefit that would flow from moving." *Id.* at 187. The Court saw no reason to treat the discretion conferred by Section 3553(e) any differently from the discretion that prosecutors enjoy when they make other important decisions, such as what charges to file against a defendant. 504 U.S. at 185. Accordingly, the Court held that a prosecutor's judgment that a defendant's substantial assistance does not warrant a sentence below the statutory minimum is unreviewable, unless that judgment is based on an unconstitutional motive, such as the defendant's religion or race. *Ibid.*

Wade indicates that the government's role under Section 3553(e) involves making not only a judgment about whether a defendant has provided substantial assistance, but also whether the nature of that assistance, considered in light of overall prosecutorial objectives, justifies a request for a reduction from the mandatory minimum sentence. The role of the prosecutor, in short, is not merely to advise the court whether the defendant rendered substantial assistance, but to make (or refrain from making) a motion. As Judge Easterbrook has stated, under the construction of Section 3553(e) adopted in *Wade*, "[n]o matter how much the judge believes that the defendant's assistance should be rewarded, the statu-

tory minimum must be enforced unless the prosecutor shares the judge's assessment." *United States v. Wills*, 35 F.3d 1192, 1197 (7th Cir. 1994) (dissenting opinion).

B. The Authority Of The Government Under Section 3553(e) Facilitates Cooperation Agreements

The statutory and Guidelines provisions that permit the government to move for a departure from the applicable Guidelines range under Section 5K1.1, without waiving the statutory minimum sentence, serve important objectives in obtaining cooperation from defendants. Plea bargaining is an important component of this country's criminal justice system, *Blackledge v. Allison*, 431 U.S. 63, 71 (1977), and the substantial assistance motion has become one of the government's principal means of obtaining cooperation from defendants to provide investigative leads or testimony in the prosecution of other persons.

The process of securing cooperation involves "painfully delicate choices." *United States v. Mezzanatto*, 115 S. Ct. 797, 804 (1995) (internal quotation marks omitted). The government must decide whether to bring a prosecution and seek applicable penalties for persons known to have committed crimes, or "whether to extend leniency or full immunity to some suspects in order to procure testimony against other, more dangerous suspects against whom existing evidence is flimsy or nonexistent." *Ibid.*; see also Daniel C. Richman, *Cooperating Clients*, 56 Ohio St. L.J. 69, 94-96 (1995) (describing uncertainties and risks for prosecutors and defendants). The process is enhanced when the government has flexibility to

determine the kind of substantial assistance motion it will file.

In many cases, the applicable Guidelines sentencing range is significantly above the statutory minimum. In such situations, the government may be able to secure a defendant's cooperation by offering a reduction from the Guidelines range alone, without offering to waive the statutory minimum terms and thus sacrifice the deterrent effect of those penalties intended by Congress. If, however, a government motion for a sentence below the applicable Guidelines range automatically gave the court authority to impose a sentence below the statutory minimum, the government would be reluctant to agree that a substantial assistance motion would be appropriate or to file any motion at all in cases in which it determined that the defendant's cooperation did not warrant a sentence below the statutory minimum.⁴

⁴ The Ninth Circuit's decision in *United States v. Keene*, 933 F.2d 711 (1991), and the Seventh Circuit's decision in *Wills* illustrate that the government and the court may often have very different perspectives on the value of a defendant's cooperation. In *Keene*, the defendant conspired to possess and distribute 437 kilograms of cocaine, which resulted in a Guidelines range of approximately 15 to 20 years' imprisonment and a statutory minimum of ten years' imprisonment. 933 F.2d at 712. The government moved for a departure from the Guidelines range, but not from the statutory minimum. The district court departed from both, however, and sentenced the defendant to only three years' imprisonment. *Id.* at 716-719 (Alarcon, J., dissenting). In *Wills*, the defendant's maximum Guidelines sentence was 108 months and his statutory minimum was 60 months. Even though the government moved for a departure from the Guidelines range, but not the mandatory minimum, the district court departed from both and sentenced the defendant to 24 months. 35 F.3d at 1194.

The unfortunate result would be that, in many such cases, the defendant would lose any opportunity to obtain a reduction of his sentence. In addition, if the government withholds the motion because it does not believe that a departure below the statutory minimum is warranted, it may run the risk that defendants in future cases would be discouraged from offering to cooperate. See *United States v. La Guardia*, 902 F.2d 1010, 1016 (1st Cir. 1990) (“[A] government which is overly grudging in moving for departures to reward valuable cooperation will likely discover a drying up of its sources of information.”); Daniel C. Richman, 56 Ohio St. L.J. at 109 (a prosecutor who is perceived as mistreating cooperators “risks not being able to attract such assets in the future”).

The substantial assistance departure scheme fashioned by Congress and the Commission should not be interpreted to require those results. As Judge Easterbrook has explained, in dissenting from a decision holding that a motion under Section 5K1.1 automatically empowers the judge to depart below a mandatory minimum sentence:

Th[e] [plea bargaining] process works best if the amount of the reward can be graduated to the value of the assistance * * *. By holding that a motion under either § 3553(e) or § 5K1.1 permits the judge to give any sentence he deems appropriate, the majority curtails the prosecutor’s ability to match the reward to the assistance. When cooperation can be procured for a modest reduction, a lower sentence overcompensates the defendant, at the expense of the deterrent force of the criminal law. Another consequence is that there will be fewer motions of any kind. If filing a motion under

§ 5K1.1 permits the judge to cut the sentence by three-quarters (as happened here), the prosecutor will insist on a great deal of assistance. * * * By converting the motion into an all-or-none affair, the majority ensures that for many defendants the allowed departure will be “none.”

Wills, 35 F.3d at 1198 (Easterbrook, J., dissenting); see also *United States v. Mezzanatto*, 115 S. Ct. at 805 (holding that a prosecutor may condition plea negotiations upon a defendant’s agreement that his statements may be used for impeachment purposes at trial, and noting that “[i]f prosecutors were precluded from securing such agreements, they might well decline to enter into cooperation discussions in the first place”).

Conferring discretion on the prosecutor in this setting is also sensible, because the prosecutor has a unique perspective on whether a defendant’s cooperation is sufficiently valuable to warrant a sentence below the statutory minimum as opposed to only a sentence below the applicable Guidelines range. Through personal dealings with the defendant and exposure to the range of criminal activity in the district, the prosecutor is in the best position to evaluate how complete and how useful the defendant’s cooperation has been. The prosecutor also has a special competence to assess the incremental encouragement of future cooperation that would result from moving for a departure below the statutory minimum (as opposed to moving solely for a departure from the Guidelines range) and to decide whether that benefit justifies the costs to deterrence. By permitting the prosecutor to decide whether a defendant should be eligible for a sentence below the statutory minimum, or just a sentence below the applicable

Guidelines range, the scheme for departures fashioned by Congress and the Commission takes advantage of the prosecutor's unique perspective and special competence in those respects.

II. A MOTION UNDER SECTION 5K1.1 THAT DOES NOT REQUEST A SENTENCE BELOW THE STATUTORY MINIMUM GIVES A SENTENCING COURT NO POWER TO DEPART BELOW THAT MINIMUM

Petitioner argues (Br. 8) that a government motion that simply acknowledges a defendant's "substantial assistance" empowers a court to depart below both the Guidelines sentencing range and any mandatory minimum sentence. Accordingly, in his view, the government's submission to the district court under Guidelines § 5K1.1 necessarily constituted authority for the court to depart below the applicable statutory minimum. That claim cannot be reconciled with the language of Section 3553(e), and it finds no support in any other source of law.

A. An "Acknowledgement" Of "Substantial Assistance" Does Not Satisfy Section 3553(e)

1. Petitioner contends (Br. 5) that Section 3553(e) authorizes a district court to impose a sentence below the statutory minimum "once the prosecutor acknowledges that substantial assistance has occurred." That reading of Section 3553(e) conflicts with its text. The district court's authority to impose a sentence below a statutory minimum is not triggered by the government's acknowledgement that the defendant has provided substantial assistance, but by a "motion of the government." 18 U.S.C. 3553(e).

Petitioner seeks to square his position with the statutory "motion" requirement by characterizing

the triggering mechanism for a Section 3553(e) departure as a "motion that substantial assistance has occurred." Br. 12; see also National Association of Criminal Defense Lawyers (NACDL) Amicus Br. 12, 15 (stating that Section 3553(e) requires a government motion "attesting to" or "certifying" substantial assistance). In our legal system, however, motions are not mechanisms for relaying information. They are requests for action. See *Black's Law Dictionary* 1013 (6th ed. 1990) (defining motion as "[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant"); *The Random House Dictionary of the English Language* 1254 (2d ed. 1987) (defining motion as "6: Law. an application made to a court or judge for an order, ruling, or the like"). The only possible action that can be requested by a motion under Section 3553(e) is the imposition of a sentence below the statutory minimum. Thus, the text of Section 3553(e) requires a government *motion* requesting a sentence below the statutory minimum before a court may exercise that power—not merely a statement from the government that the defendant has provided substantial assistance.

2. The second sentence of Section 3553(e), relied on by petitioner (Br. 12), does not lead to a different conclusion. It states that a sentence below the statutory minimum "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." That language means simply that, in cases in which the government seeks a sentence below a statutory minimum, the Commission's guidelines and policy statements govern the court's exercise of discretion in imposing such a

reduced sentence. By including that statutory directive, Congress intended that a government motion for a sentence below the statutory minimum would not lead to the resurrection of the unguided district court discretion that Congress sought to replace when it enacted the Sentencing Reform Act only two years earlier. See *Wills*, 35 F.3d at 1198 (Easterbrook, J., dissenting) (the second sentence of Section 3553(e) means that "the prosecutor's authorization to impose a sentence below the statutory minimum does not permit the judge to throw out the guidelines and impose any term that strikes his fancy").

B. The Sentencing Commission Is Not Authorized To Dispense With The Requirement Of A Government Motion Under Section 3553(e), And Did Not Intend To Do So In The Guidelines

1. Petitioner and his amicus argue that 28 U.S.C. 994(n) empowers the Commission to provide that a court may impose a sentence below the statutory minimum even absent a government motion for such a sentence. Pet. Br. 12-14; NACDL Br. 10-11. That argument is incorrect. Section 994(n) provides that "[t]he Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by a statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person." 28 U.S.C. 994(n). That Section requires the Commission to reflect in the Guidelines Congress's general policy to give a sentencing reward to a defendant who renders substantial assistance. It does not, however, trump the requirement in Section

3553(e) of a government motion as a prerequisite to a departure below the statutory minimum, which was enacted in the same Act. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1007, 1008, 100 Stat. 3207-7 to 3207-8.

Nothing in the text of Section 994(n) gives the Commission the authority to override Section 3553(e), and the Commission therefore must exercise its authority under Section 994(n) in a manner that is consistent with the requirements in Section 3553(e). See *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (one section of an Act should not be interpreted "to emasculate" another section of the same Act); *Pittsburgh & L.E.R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989) ("when two statutes are capable of co-existence * * * it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"). Just as the Commission has no authority to amend a statute that establishes a mandatory minimum sentence, *Neal v. United States*, No. 94-9088 (Jan. 22, 1996), slip op. 5, the Commission has no authority to amend the statute that establishes the circumstances under which a court may impose a sentence below a statutory minimum. Accordingly, in fashioning Guidelines pursuant to Section 994(n), the Commission may not authorize a court to impose a sentence below the statutory minimum in cases in which the government does not request such a sentence. Any Guideline that purported to do that would exceed the Commission's authority under Section 994(n).

2. Petitioner also errs in arguing (Br. 18-31) that the Commission intended in Section 5K1.1 of the Guidelines to authorize a district court to impose a

sentence below the statutory minimum whenever the government files a motion stating that the defendant has provided substantial assistance. It would be surprising if the Commission had intended to contradict the mandate of Section 3553(e) that a government motion is required for a departure below the statutory minimum. And, upon analysis of the provisions of Section 5K1.1 and its commentary, it is apparent that the Commission did not do so.

In Section 5K1.1, the Commission provided that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." The text of Section 5K1.1 refers only to departures "from the guidelines." It does not refer to departures from a statutory minimum. The text of Section 5K1.1 therefore cannot be understood to eliminate the requirement in 18 U.S.C. 3553(e) that a court may depart below the statutory minimum only when the government requests a sentence below the statutory minimum.

Nor does application note 1 to Section 5K1.1 indicate that the Commission intended to authorize a court to depart below the statutory minimum once the government seeks a sentence below the applicable Guidelines range. See Pet. Br. 24-26. That application note states that a sentence below a statutory minimum may be justified "[u]nder circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n)." One of the "circumstances set forth in 18 U.S.C. § 3553(e)" for a sentence below the statutory minimum, however, is a "motion of the Government" for such a sentence.

The text and commentary of Section 5K1.1 therefore make clear that a court may apply Section 5K1.1 in departing below a statutory minimum only when the government requests a sentence below the statutory minimum pursuant to 18 U.S.C. 3553(e). Thus, when the government requests a sentence below the applicable Guidelines range, but does not request a sentence below the statutory minimum, the court has no authority under Guidelines § 5K1.1 to impose a sentence below the statutory minimum. In that situation, the court may depart from the applicable Guidelines range, but only to a floor set by the statutory minimum term.

That does not mean that Section 5K1.1 is wholly inapplicable to departures below the statutory minimum. Once the government files a motion under Section 3553(e), the sentencing court is guided by the factors set forth for consideration in Guidelines § 5K1.1.⁵ That reading of Section 5K1.1 and its commentary eliminates the three purported anomalies identified by petitioner and his amicus NACDL. First, petitioner contends that, if Section 5K1.1 had no application to departures below the statutory minimum, it would mean that the Commission had not fulfilled its responsibility under Section 994(n) to

⁵ Those factors include: "(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant's assistance." Guidelines § 5K1.1(a).

provide guidance for departures below the statutory minimum. Br. 33. Second, petitioner contends that it would mean that what is labelled an application note does not contain information on how Section 5K1.1 should be applied. Br. 25 n.14, 34 & n.21. Finally, NACDL contends that it would mean that the extent of a departure below the statutory minimum would not be governed by the list of factors in Section 5K1.1. NACDL Amicus Br. 23. The answer to all those asserted anomalies is that Section 5K1.1 does apply to departures below the statutory minimum, but only after the government requests a sentence below the statutory minimum.⁶

⁶ The other application notes cited by petitioner are unilluminating. See Guidelines § 5K1.1, application note 2 (referring to a Section 5K1.1 departure as a "sentence reduction"); *id.* at application note 3 (stating that substantial weight should be given to the government's evaluation in evaluating the extent of the departure); Guidelines § 2D1.1, application note 7 (providing that a "mandatory minimum sentence may be 'waived' * * *, as provided in 28 U.S.C. 994(n), by reason of a defendant's 'substantial assistance * * *.' See § 5K1.1"). None of the notes suggests that the Commission intended to permit a departure under Section 5K1.1 below the statutory minimum in the absence of a government request for such a sentence pursuant to 18 U.S.C. 3553(e).

C. The Requirement Of A Government Motion Under Section 3553(e) Does Not Impermissibly Restrict The Discretion Of The Sentencing Court Or Encourage Unwarranted Disparities

1. Petitioner contends (Br. 39) that the court of appeals' interpretation of the substantial assistance scheme results in an unwarranted transfer of sentencing power from the district court to the prosecution. That suggestion is unfounded. Under the court of appeals' interpretation, the power over substantial assistance departures is shared by the prosecutor and the court. The prosecutor can affect only the lower end of the sentencing range. When the government moves for a departure from the applicable Guidelines range, but not a departure from the statutory minimum, the sentencing court may go down as far as the statutory minimum; when the government files a motion for a departure from the statutory minimum, that barrier is eliminated as well. Once the government files its motion and the sentencing floor is established, however, the district court retains discretion to impose any sentence within that range that is consistent with the Commission's Guidelines and policy statements.

The government's ability to affect the sentence by filing one kind of substantial assistance motion rather than another is analogous to the government's ability to affect sentencing through selection of the charge. See *United States v. Batchelder*, 442 U.S. 114, 123-125 (1979) (holding that a prosecutor has discretion to prosecute a defendant under one statute rather than another in order to expose the defendant to a higher sentence). The government's selection of one charge over another can lead to dramatically different sentencing ranges. The district court re-

tains discretion, however, to determine the appropriate sentence within the range dictated by the charge. *Id.* at 125. Here, as in other settings, that sort of exercise of prosecutorial judgment is valid and consistent with the sentencing role of courts. See *Wade v. United States*, 504 U.S. at 185 ("we see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions").

2. Petitioner also contends (Br. 37-38) that the court of appeals' construction of the substantial assistance scheme will lead to unwarranted disparities in sentencing. Permitting the government to participate in establishing the sentencing range available to a defendant who cooperates is no more likely to lead to unwarranted disparities than would a regime under which the extent of a departure would lie wholly in the discretion of individual district judges, subject only to the Commission's guidance concerning the factors a court should consider. In any event, Congress resolved those policy issues by including the government motion requirement in Section 3553(e), and any change in the requirement of a government motion as a prerequisite to the imposition of a sentence under a mandatory minimum must come from that body.⁷

⁷ Petitioner also suggests (Br. 40) that the rule of lenity compels the adoption of his interpretation of the substantial assistance scheme. The rule of lenity, however, "is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith v. United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks and emphasis omitted). For the reasons discussed, that is not the situation here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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